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United States of America

IN THE

Supreme Court of the United States

No. 1075

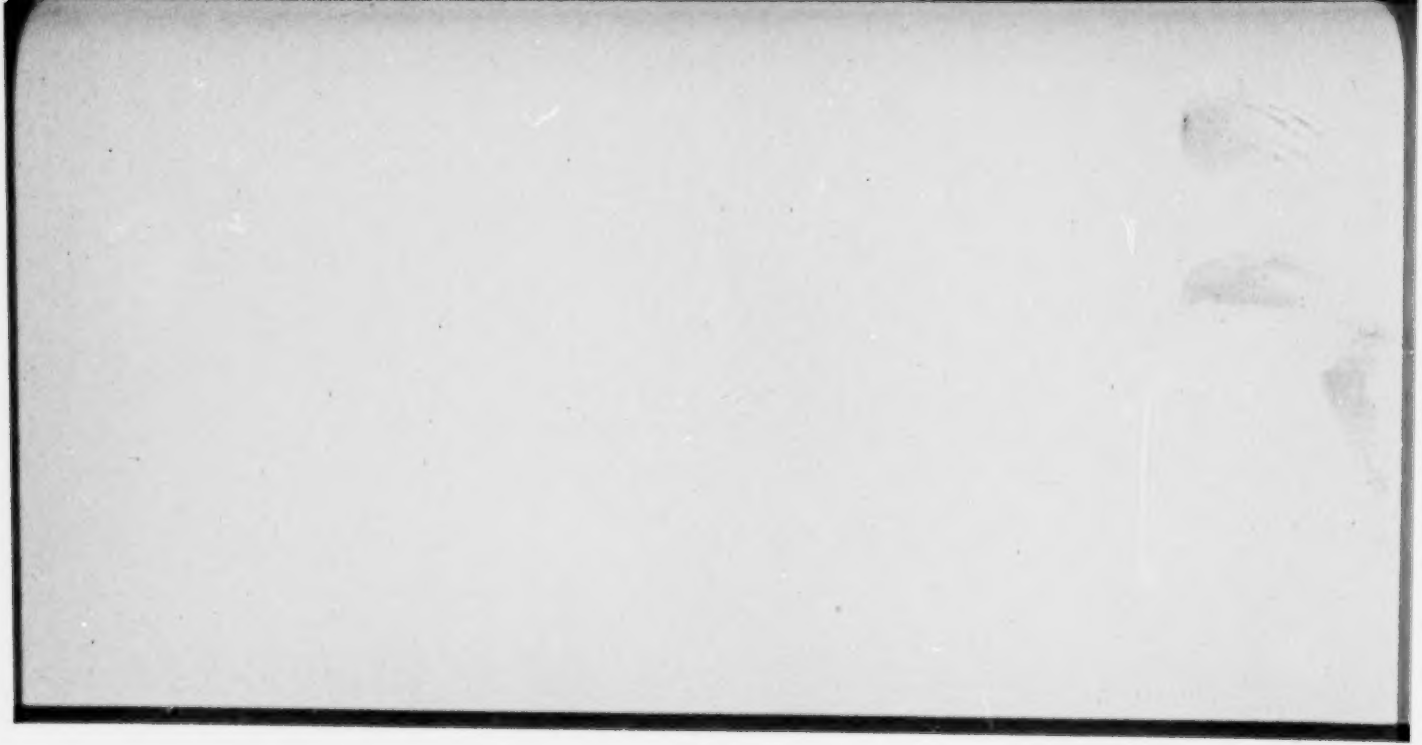
LOUISE METZINGER,
Plaintiff and Appellee,
vs.
JOSEPH METZINGER,
Defendant and Appellant

PETITION FOR ALLOWANCE OF APPEAL AND FOR WRIT OF CERTIORARI

JOHN R. ROOD,
Attorney for Petitioner, and Member of the Bar of the Supreme Court of the United States,

ROYAL D. ROOD,
Of Counsel.
Business Address:
401 Cadillac Square Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.



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United States of America

IN THE

Supreme Court of the United States

No.....

LOUISE METZINGER,
Plaintiff and Appellee,
vs.
JOSEPH METZINGER,
Defendant and Appellant

NOTICE AND PETITION FOR ALLOWANCE OF APPEAL, AND FOR WRIT OF CERTIORARI, TO THE UNITED STATES SUPREME COURT; ASSIGNMENTS OF ERROR

To the Clerk, and to Wayne County prosecuting attorney, Friend of the Court Edward Pokorny, and to plaintiff appellee Louise Metzinger and her attorney Max Hulett:

Please take notice:

Joseph Metzinger hereby gives notice of his following petition filed in the United States Supreme Court for appeal and for certiorari, relative to the determination obtained in the purported behalf of Louise Metzinger, and more particularly described in said petition and its attached statements. Your attention is called to the notice of Rule No. 12, par. 3, served upon you herewith.

February 28, 1945.

JOSEPH METZINGER,
Appellant Petitioner,

By JOHN R. ROOD, his Attorney and Member of the Bar of the United States Supreme Court.

ROYAL D. ROOD,
Of Counsel,

Business Address: 401 Cadillac Square Bldg., Detroit 26, Michigan.

PETITION

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Comes now Joseph Metzinger, defendant and appellant in this cause with Royal D. Rood, his counsel; and, being aggrieved by an unconscionable and illegal imposition upon him of involuntary servitude to his nearly mature son by the final determination of the court of last resort in the State of Michigan having jurisdiction to hear his said matter litigated, the Michigan Supreme Court, rendered January 2, 1945, affirming without change such determination by the Circuit Court sitting in Chancery for the County of Wayne and State of Michigan entered March 5, 1943; re-hearing of which affirmation was denied February 20, 1945; now he files herewith this his notice and claim of appeal, and his assignment of errors citing the challenged statute basing action against him, herewith, and the various statements appended hereto, as a part hereof, and petitions this honorable court to allow said appeal, and to reverse and nullify said determination; and being further aggrieved by said determination denying him due process regarding his petition for custody and services of his nearly mature son, files said notice of appeal and assignment of errors with statement of material facts and prays for writ of certiorari to the Michigan Supreme Court for a review of said determination represented by the Michigan Supreme Court to be authorized by Michigan Public Act 412 of 1919 as amended, an Act alleged throughout proceedings below to be repugnant to the 14th Amendment to the United States Constitution, and designed by confusion of civil, criminal, chancery, and illegal, cruel and unusual practices, to deprive the litigant, and this defendant appellant, of due process, wherefore

and for such deprivation it is prayed said determination be reversed and nullified and that mandate require due hearing on his petition; and it is further petitioned that allowance of appeal operate as a supersedeas upon this appellant filing a bond conditioned as required by law, and in like amount with his current stay bond assured by the same or other approved sureties.

Respectfully submitted,

JOSEPH METZINGER,
Appellant Petitioner,
Address: Detroit, Michigan.

JOHN R. ROOD,
Attorney for Petitioner, and Member of the Bar of the Supreme Court of the United States,

ROYAL D. ROOD,
Of Counsel.

Business Address:
401 Cadillac Square Building,
Detroit 26, Michigan.

QUESTIONS PRESENTED

(Parenthetical references hereinafter are identified, R. for printed record, B. for brief for Joseph Metzinger, Appellant, P. for petition asking rehearing, all praeciped as part of the record on appeal in this court from the Michigan Supreme Court; other references unabbreviated.)

A.

With reference to Michigan Public Act 412 of 1919 as amended, cited in its opinion filed in this cause by the Michigan Supreme Court as 3 Comp. Laws, 1929, Sec. 12783 *et seq.* as amended, and as Stat. Ann. 1944 Cum. Supp. Sec. 25.171 *et seq.*, challenged below (R. 49-50) as repugnant to Section 1 of the Fourteenth Amendment to the United States Constitution, but held below to be a valid authorization of the determination appealed:

1. May the defendant appellant be subjected to condemnation by a tribunal created in avoidance of additional judges, and for the relief of over-burdened metropolitan courts, but operating under no regular established and by no known rules assuring him of protection by due process from the whim or interested discretion of said tribunal?

2. May the defendant appellant be condemned by a tribunal so created and uniting in the same official the functions, respecting defendant appellant's cause, of advocate and umpire, prosecutor and judge?

3. May the defendant appellant be compelled to submit to a reference of his cause to a public officer required by said statute in said manner to advocate the interest of an adverse party (minor son) determined by said statute to

deserve the public charity of such tax-supported legal aid, and required by said statute in the same matter to function as a master in chancery, and upon whose recommendation being tendered the court the defendant appellant is not permitted to make any record whatsoever in the court upon the merits either by examination there of witnesses, or cross-examination of witnesses against him, or otherwise?

4. May the cause of defendant appellant be referred by statute and court rule, for the sole and only hearing permitted, to an officer granted under such statute a practical monopoly and financial interest in the barratrous maintenance of litigation restricted almost entirely to divorce and domestic relations matters deemed by the legislature to be deserving of public charity in the nature of legal aid?

5. May the subterfuge of concealing a criminal prosecution under the title and procedure of private litigation between private citizens be used to deprive the defendant of the special protections due under a frankly criminal prosecution in the entitled name of The People?

B.

With reference to the further denial of equal protection of the law and due process:

6. May the defendant appellant in a proceeding entitled strictly between private litigants be condemned to involuntary servitude through maintenance of said action by the licensed barratry of public officials salaried out of general public taxes upon no charge notified to him as authorizing prosecution in the public interest, and not notified to be prosecuted by public officials in the public

interest, and upon which no hearing whatsoever is permitted or pretended?

7. May the defendant appellant be condemned by a proceeding deliberately and confessedly concealing from him in accordance with "general practice" representations of fact and argument obtained by the trial court with intentional secrecy and "heavily" relied upon by it in arriving at its determination?

8. May defendant appellant be subjected to condemnation under such vague, uncertain, unknown, and changable practice as to deny him all assurance of due process, by action depriving him of chance to appear specially contesting the jurisdiction of the court, with right to be clearly and specifically informed of the court's ruling thereon, and opportunity thereafter on a specific notice to make record at a public hearing on the merits before an impartial judicial tribunal?

9. May defendant appellant be denied a public trial on the merits before an impartial judicial tribunal?

10. May defendant appellant be condemned without a public hearing by due process before an impartial judicial tribunal to an involuntary servitude wholly uncompensated, in favor of an able-bodied son now past fifteen years of age?

11. Is due process of law denied when the only foundation by way of process is the supposed retained jurisdiction under a proceeding concluded by final decree over ten years previously?

12. May a petition duly standing at issue by answer, after a motion for reference to a disqualified master being rendered *res adjudicata* by dismissal on argument, thereafter be dismissed without hearing by the court in charge

thereof despite a praecipe ordering same for trial, for mere lack of a substitute hearing officer satisfactory to the caprice of the court itself?

13. May the court penalize the defendant appellant for his attempt to test the reasonableness of an official demand for unauthorized funds by adding thereto upon the taking of necessary steps to accomplish that test?

14. Where defendant appellant is subjected by public officials salaried out of general public taxes to a discrimination for the purpose of prosecuting him ostensibly in the public interest on pretext of a wrong nowhere charged in the record, and nowhere of record, unless perhaps if at all by the pleadings in strictly private litigation finally concluded more than a decade prior, yet supposed by said officials to authorize more than a decade thereafter a second jeopardy for his uncompensated further amercement to be enforced by alternative imprisonment at the discretion of a court on plea of contempt; may such defendant appellant, notwithstanding that speedy public trial and a disinterested jury, and protection against inquisition and double jeopardy are guaranteed as a matter of due process northwest of the Ohio River relative to criminal (discriminatory) proceedings, be disallowed against his timely objection any due process incident to and required for the defendant in every prosecution for crime?

15. This defendant appellant having appeared in the trial court only specially (R. 27; R. 33; R. 45; R. 59; R. 70) to plead to the jurisdiction over his person, and hearing thereon having been denied (R. 33; R. 71); and inquisition having been imposed lacking protection by legal counsel (R. 33-41); and ruling upon that occasion being entered, "heard and submitted" (R. 39); and thereafter a further order being entered, without process to defend-

ant except a letter with copy thereof to the attorney entered on special appearance, referring said cause (R. 42) to a master in chancery[1] brushing aside said plea to the jurisdiction and the further plea objecting to the said referee as disqualified by interest (R. 27-31; 44-55); and thereafter without general appearance of defendant appellant in any manner having been entered, waiver of the plea to jurisdiction over his person "in no place" (R. 71) appearing; and further objections being offered based[2] on the personal bias and prejudice disqualifying the trial judge by virtue of his interest established under the challenged statute; and no order (R. iv, v) having been entered at any time vouchsafing determination of the issue of jurisdiction over the person so to give defendant appellant not generally represented (R. 27) an official, specific, duly served (R. 112) notice after determination of the issue of jurisdiction requiring him to make his defense on the merits; and no hearing in the trial court or notice thereof to the defendant appellant being even pretended beyond said ruling "heard and submitted" (R. 39; R. iv-v; R. 27; R. 33); and the court having ruled of the defendant appellant that he "demands the right to make a record in this Court. This demand has

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[1]Called Friend of the Court, and, by his brief *amicus curiae* on appeal (in the Michigan Supreme Court,—praeciped as a part of the record on appeal herewith) conceded through ignoring entire discussion in appellant's brief (likewise praeciped) to have been established in control of important election help and political machinery required by the judge for his periodic re-election to office as well as otherwise and financially interested (R. 21-25) in the outcome of said litigation, and functioning in said cause under appointment by the Governor of Michigan as public prosecuting attorney permanently substituted for the constitutional officer to advocate (R. 34; 38; 39; 42; 56; 94; 113) for the infant real party plaintiff in interest against defendant appellant.

[2]R. 2, Sec. I-f; R. 97; and at B. 79-80 and 223-234, for more extended discussion concerning said elected judge.

been denied" (R. 71); and said Wayne Circuit Court having determined and entered final judgment (R. 73-4) based upon representations of fact and argument concerning said issue of jurisdiction deliberately concealed in accordance with "practice . . . generally" (R. 90) from defendant appellant and his counsel (R. 56-64; 88-92) coincident with similar determination of the merits; has defendant appellant's objection on appeal that he has by such steps been denied a hearing before an unbiased, impartial, and disinterested tribunal been sufficient to authorize ruling said determination void for denial of due process?

16. With reference to the national military defense issue, is barratrous maintenance by a tax-supported agency, licensed by the challenged statute to a practical monopoly over a field of litigation largely restricted to matters of divorce and domestic relations, upon pretext of charitable public concern, a maintenance of private litigation contrary to necessary public policy?

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

More than a decade following an absolute divorce and satisfaction of a lump sum alimony decree (R. 8), throughout which period the defendant appellant, hereinafter known as Joseph, maintained without delinquency his able-bodied son, now past fifteen years of age (R. 114) of that marriage, in full compliance with that decree in the home and custody of the boy's mother; Joseph obtained to be served by the sheriff upon said mother, hereinafter known as Louise, a petition for recovery of the boy's custody and services by a proposed modification of said divorce decree (R. 12-15), with due rule to plead. This

petition Louise answered (R. 16-17), but filed her own void affidavit (R. 17-18) that before receiving said service by the sheriff she herself had personally handed to Joseph a motion in the ancient divorce cause with notice (R. 9) of summary hearing thereon to obtain (R. 10-11) on behalf of said son a substantial servitude beyond that provided in said divorce decree. No general appearance by Joseph, nor any definite court ruling, recognizes that challenged service.

Thereupon, assuming conviction of the defendant Joseph of such crime as to warrant prosecution by the public prosecuting attorney empowered by Michigan Public Act 412 of 1919 as amended, and maintained by the political comradery of public employees aiding said public prosecuting attorney, motion (R. 19-20) was filed by the aid of said prosecuting attorney (R. 21-4; 23, par. 3) to refer Joseph's matter to said public prosecuting attorney for his action thereupon in the nature of that of a master in chancery (R. 19-20).

Upon sworn answer (R. 21-24) to said motion, averring criminal barratry and maintenance by said public prosecuting attorney, and his financial interest in the outcome of his said activity, at no time or place in the record, pleadings, argument, or briefs, denied, contradicted or contravened, an order subsequently ignored but never specifically vacated was entered in said cause by Honorable Joseph A. Moynihan (R. 25) of said Wayne Circuit Court dismissing said motion for a reference, constituting that point *res adjudicata.*

Thereafter said Wayne Circuit Court, acting by an associate judge of said court, Honorable Ira W. Jayne, challenged at first opportunity as (R. 97) disqualified, but acting under the purported authority of said Michigan Public Act 412 of 1919 as amended, entered an order (R.

42) contrarily determining said *res adjudicata* by requiring reference of the matter between Louise and Joseph to said public prosecuting attorney, whose title under said statute is Friend of the Court, being Edward Pokorny. Thereupon criminal prosecution, conviction, and sentence was illegally imposed and finally determined as follows:

The Offense:

Notwithstanding no known crime charged at any time or in any language against Joseph authorizing discrimination against him by the political power of said public prosecutor Edward Pokorny and fellow public employees in the purported interest of the general public, he and they did so discriminate and prosecute against Joseph under the authority of said order said action directed toward imprisonment or uncompensated penalty, maintaining by their political influence said barratrous activity purported to be in the public interest as excusing their activity, but in the name of the private party, the said Louise, whereby to avoid the legal burdens of criminal prosecution, and under the color in chancery of her ancient divorce proceeding as a means of denying Joseph such protection as at law he might demand by jury against the penalties imposed. The said statute purportedly authorizing said order and prosecution, said Michigan Act 412 of 1919 as amended, being the only citation given in the opinion of the Michigan Supreme Court sustaining the lower court, cited in its opinion as "3 Comp. Laws 1929, Sec. 12783 *et seq.*, as amended (Stat. Ann. 1944 Cum. Supp. Sec. 25.171 *et seq.*)" authorizes penalties of prosecution in the public interest, being "An act for the protection of dependent minor children and to compel enforcement of chancery decrees where there are minor children in divorce cases, who are liable to become public charges and are not properly cared for by their custodians." But

no such charge has even been made or pretended against Joseph, nor any pretense made of hearing at any time under any conditions for defense against such charge. Neither could any such charge be honestly maintained against the defendant Joseph. Even if the accriminations, incriminations, and re-criminations of a private party plaintiff are by that statute sufficient ground for discrimination in the public interest for the crime charged, no crime appears anywhere in the record charged within the provisions of that statute, nor any delinquency in any chancery decree, nor any liability of any child or minor to become public charge.

Date of Judgment:

January 2, 1945, in the Michigan Supreme Court, affirming judgment entered by the Wayne Circuit Court of Michigan, March 5, 1943. Re-hearing denied Feb. 20, 1945.

Brief Description of Penalty, Judgment and Sentence:

Being thus convicted at unknown proceedings of an unknown crime subjecting him to the penalties purportedly authorized by said statute so cited, Joseph was thereupon in purported accordance with the provisions of said statute denied any hearing whatsoever upon his own petition for the custody and resulting services of his nearly mature son before an impartial tribunal, which petition was dismissed (R. 74) for failure to submit the same notwithstanding said order of Judge Moynihan to the action, decision, and recommendation of said prosecuting attorney, constituted by said statute both an advocate and umpire, prosecutor and judge, in said matter.

Involuntary servitude to the said son, uncompensated by any services or consideration whatsoever, was required, adjudged, decreed, and ordered by the final sentence ren-

dered, to the extent of a large sum of money of indefinite amount, but payable in weekly installments fixed at various figures "until the further order of the court" (R. 74); for failure to meet which at the various times and in the various amounts so fixed over and above the provisions of the ancient divorce decree, Joseph was by the terms of said statute subject to further barratrous prosecution by political comradery of salaried officials involving summary imprisonment (see *In re Lupu,* 285 Mich. 500) on the pretext of being guilty of contempt of court without opportunity at any time to protection by a jury from the whims and personal interests of the political comradery in control.

Some Procedural Details:

The defendant appellant Joseph was denied any and every right and opportunity to be heard on any phase of the matter involving him by due process in open court, and denied the benefit of special appearance (R. 27) to challenge the jurisdiction of the court, by a proceeding of cruel and unusual nature, in that the trial court ruled of the defendant appellant (R. 71) that he "demands the right to make a record in this court. This demand has been denied." . . . and cruelly and publicly punished Joseph by brow-beating him at a public inquisition in court at the pretended hearing on the merits of the petition filed by Louise, whereat oral argument and protection by attorney were denied and refused to Joseph (R. 33). In compliance with said commanded inquisition before the Honorable Ira W. Jayne, Joseph had testified (R. 36) as to the pro-confesso divorce in 1931, "Your Honor, I am married again the second time. I am getting along fine. In the first place I didn't want that first divorce. At the same time I wanted to be decent." The court having previously commented (R. 37) "You are both obviously decent

people," responded (R. 38) "If you want to be decent about it, that's all there is to it. I hate to see you led astray by a lawyer who is more interested in insisting on some theory he has got than in seeing justice is done. You will have to get that into your head. I am going to put this over for a week for you to think it over."

The following week, at the continued inquisition, with oral argument, record, and legal aid still denied, and every due form of hearing, and all benefit of special appearance denying the jurisdiction of the court, the cruel and unusual punishment of further brow-beating was continued, by the most cruel of all mental punishment, a threat of indefinite and unknown punishment deliberately left vague with menace in the words, "take action" whereby the court bellowed publicly into the frightened ear of the defendant appellant (R. 39): "Well, I will ask you again. You have had a whole week to think this over. I am asking you again what you are willing to do voluntarily about these doctor bills of the child before I take action." Bias and prejudice (R. 97) on the part of the judge was challenged at first opportunity, and prior to any order to defend. Although no hearing whatever had been allowed Joseph, the court nevertheless entered the ruling (R. 39) "heard and submitted." However the court had not decided by any order entered the issue of jurisdiction, respecting which he had permitted the defendant appellant only such legal aid as might be provided in writing (R. 33), due to be filed at no ordered day, but presumedly after the termination of said inquisition and before any proceeding thereafter in open court, which was accordingly accomplished (R. 44-53). But a formal order of reference was subsequently entered and noticed not to the defendant appellant, but to the attorney appearing specially (R. 42-3; R. 112). Subsequently the court, or the trial judge thereof, solicited a secret hearing on the issue

of jurisdiction from which the defendant appellant and his attorney were excluded, of which it later remarked at the settling of the record on appeal (R. 90), "I asked Mr. Pokorny for his comment and observation on these objections. I don't mind the record showing the practice of this Court generally, and I think—I know my own is to lean heavily on the Friend of the Court in all of these divorce matters."

The false and prejudicial representations of fact and argument against the defendant appellant thus obtained, was the subject of a question by the court to which the prosecuting attorney, Friend of the Court, Mr. Pokorny, replied (R. 91-92), "This is not a pleading which should have been served upon Mr. Rood or his client, but is merely a memoranda stated between the Court and the Friend of the Court, nothing else. It is not a pleading . . . but Mr. Rood classes it as a pleading which should have been served, copies on the other side, and so forth."

OPINIONS BELOW AND POINTS TO BE RELIED UPON

In compliance with requirement for concise non-repetitious pleadings, the opinion (R. 69-72) of the court of first instance, the Wayne Circuit Court, filed February 16, 1943, authorizing its final determination (R. 73-4) filed March 5, 1943, and the opinion of the Michigan Supreme Court affirming same and filed January 2, 1945, are appended (with its ruling on re-hearing) to the jurisdictional statement filed separately herewith on behalf of the defendant appellant under U. S. Court Rule 12, Sec. 1, setting up the points to be relied upon, and hereby made part hereof by reference.

SPECIFICATION OF ERRORS TO BE URGED

The Wayne Circuit Court of Michigan, and the Michigan Supreme Court by its decision of affirmance, erred:

1.

In holding valid the Michigan Public Act cited herein under "Questions presented," cited by the Michigan Supreme Court as the basis of said determination, and challenged at earliest opportunity by defendant appellant appearing specially to contest jurisdiction as being repugnant to the United States Constitution, Article XIV of Amendments, Section 1, guarantying due process and equal protection of the law.

2.

In converting a civil suit in chancery, prosecuted by a private citizen, into a criminal proceeding directed toward an uncompensated contribution and imprisonment, and maintained by public officials sustained out of general taxes, and thus subjecting defendant appellant to a criminal prosecution depriving him of his property and liberty upon no matter of record within a decade involving him in wrong, for no offense against the public known to the law, without any charge whatsoever of such offense against him either made or pretended, with no hearing either permitted or pretended thereon, and compelling him to submit to inquisition without protection of counsel, and to submit the matters involving him to the decision of a tribunal operating under no established or known procedure, and without benefit of such due process as is accorded to persons accused of crime and such impartiality as has been determined to be due process by the Constitution of Michigan "in every criminal prosecution"

—Art. II, Sec. 19, requiring "an impartial jury"; which said conversion is repugnant to said Fourteenth Amendment, and is in violation of the Thirteenth Amendment to the United States Constitution prohibiting involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted," and contrary to Section 1 of the 14th Amendment, and contrary to Art. II of Sec. 14 of the Ordinance of the Northwest Territory.

3.

In subjecting defendant appellant for his sole opportunity to make a record unto an official in whom were merged respecting said cause the functions both of advocate and hearing officer under said state statute, and who was otherwise involved in said cause by partial and financial interest in the outcome of said litigation, and uncurbed by any known practice of regular procedure from imposing upon the defendant appellant the whim and discretionary caprice of said official, contrary to said Fourteenth Amendment.

4.

In depriving defendant appellant of the protection of public trial before an unbiased, unprejudiced, disinterested, and impartial tribunal by regular and known rules of procedure, contrary to said Fourteenth Amendment.

5.

By concealing from the defendant matter presented the trial court in his cause against him, until after the determination of said cause and entry of judgment, contrary to said Fourteenth Amendment.

6.

By subjecting defendant for determination of facts to his antagonist as judge.

7.

By dismissing without hearing the petition of Joseph Metzinger for custody and services of his son past 12 years of age, duly filed, served, and answered, which stood, after dismissal of motion on behalf of Louise Metzinger seeking reference to the Friend of the Court Edward Pokorny, ready praeciped for trial in open circuit court.

8.

Imposing an unreasonable and unjust penalty upon defendant appellant incident to his appeal to the Wayne Circuit Court to test the reasonableness of the Friend of the Court's demand for unauthorized funds.

9.

By leaving public policy respecting the effect of judicial procedure on stability of family life as a national prerequisite for a sufficient defensive population a generation hence against threatened perils from across the Pacific Ocean wholly unattended.

PRAYER

Wherefore it is prayed the determination below be reversed and that mandate issue requiring hearing in open court by due process on the petition of Joseph Metzinger for custody and services of his son, either protected from barratry, or protected by process due in a criminal action.

REASONS FOR GRANTING APPEAL AND WRIT OF CERTIORARI

This case merits the consideration of this court, not so much because of any injustice suffered by this defendant

appellant, as because it merely marks an illustration of the results induced by a revolutionary method of procedure in matters of domestic relations, child custody, and divorce, designed to relieve excessive pressure upon the court's time, but peculiarly adapted to political capitalization upon purported charitable considerations involving exceeding peril to the nation and a wholesale denial of the due process of law in such matters, condemning defendants charged with no specific offense known to the law, additionally burdened with all the evils of criminal barratry and maintenance unaided by any sort of protection, denying them any hearing before any tribunal of known or established procedure, denying them opportunity to be confronted by witnesses against them, to know the evidence presented against them, to cross-examine those witnesses and that evidence, and even to be heard by counsel. The particularly unfortunate collateral effect, as the undisputed statistics demonstrate, is the serious reduction in the ratio of legitimate unions and recorded marriages, the remarkable increase in illicit co-habitation, a shocking reduction in the national birth rate during the past generation of social reform, keyed to various dates at various places, dependent upon the time of adoption of the revolutionary practices illustrated in this appeal,—and at no distant date threatening our national security because of the rapidly increasing population and organized power of our potential enemies, east and west, and failure arising from this revolutionary judicial procedure to have the necessary defensive population when the crisis arrives. If this court can protect us against the fatal effects of our friends' good intentions and charitable activities, while there yet is time, we shall perhaps be able to take care of our enemies, under the post-war plans being urged by our military leaders.

It is notable that, in a work which has seriously disturbed British Military leaders, and still does, since its first publication in 1912, by Homer Lea, recognized by General Douglas MacArthur's staff as of outstanding military genius in connection with Philippine activities, initiated in active military tactics as Lieutenant General in the army of Chinese Emperor Kwang Hsu resulting in the overthrow of the Manchu dynasty, called as military counsellor to Great Britain by Field Marshall Lord Roberts, finally in 1910 as military counsellor to Kaiser Wilhelm II, and later again to Lord Roberts, before returning to the service of the Chinese Republic; we find in reference to remarkably accurate forecasts of the first and second world wars as episodes "upon the never-ending battle-fields of the world" (his language at p. 83) the emphasis of military authority on the point of birth-rates and population:

> "It can be regarded in modern times as a basic principle that whenever a rich and sparsely inhabited region lies within the sphere of the racial expansion of greater and more populous empires, that expansion will result unless prohibited by potential or actual power superior to that of the expanding race . . . (p. 70).
>
> "The period when a race's natural expansion becomes migratory is determined when the population exceeds the productive capacity of their native soil plus the knowledge and ability to reach those lands that give to their labor not alone sustenance but increment . . . (same).
>
> "The universality of knowledge, and a similar universality in the application of sciences, places all mankind on an equal footing as regards the use of mechanical appliances in war or in the business of peace, with the establishment of equality in the means of conducting war we must revert for its decision to that old factor, the inequality of popula-

tion and the numerical disproportion between the forces engaged . . ." (p. 72).

The Day of The Saxon, Homer Lea (1912—edition of 1942).

His further pointing at page 83 to the inevitable racial basis of World War III, focused at page 73 upon factors in the Australian colonies, particularized at page 123 in "a coalition of races formed and directed by natural forces against a solitary and scattered race, we become cognizant of those eventualities that, in the near future, await the Saxon race," is given interesting support in a quotation at page 114 from Peter, Czar of Russia. Our involvement by Eastern Asiatic powers would seem difficult to escape. It is doubtful that any movement for "Union Now," or other plans can accomplish any such escape,—a doubt apparently supported by Secretary Forrestal's demand for naval forces "capable of controlling the world's oceans," futile however, if we prevent the essential population to support the forces.

The disturbing fall by nearly 50% in our national birth rate, keyed apparently to local dates and places coincidental with establishment of the revolutionary judicial procedure in the instant cause appealed, as accomplished by well-meaning social reformers urging charitable legal aid in our metropolitan areas appears more carefully analyzed and discussed at pages 234 and 244 of the brief on appeal filed with the Michigan Supreme Court on behalf and in the name of Joseph Metzinger, and praeciped as part of the record on appeal to this court.

If that judicial revolution in procedure is indeed one of the effective factors in that fall in birth rates, it would seem most unwise to leave the problem so induced wholly unattended upon the specious plea that the various state

legislatures have it in their power to correct the courts. State courts may very properly prefer to be guided in such considerations by the United States Supreme Court, which may properly be sensitive to national problems, rather than by occasional half-hearted pleas by attorneys presumably busy with earning fees.

Perhaps the most carefully supported statement ever made on the seeming contrary results of well-meant social reforms based upon charitable considerations was that made by the Reverend Professor of Economics, Thomas Malthus, when he wrote in his fourth book, after three books of voluminous statistics, and activated the heated debate which still continues unabated after more than a century:

> "There is no subject to which general principles have been so seldom applied; and yet, in the whole compass of human knowledge, I doubt if there be one in which it is so dangerous to lose sight of them; because the partial and immediate effects of a particular mode of giving assistance are so often directly opposite to the general and permanent effects."
>
> *The Principles of Population*,—Book IV, Chapter 13, third par.

Meticulous examination of the judicial procedures appealed would seem hardly appropriate to this petition after the 250-page brief filed in the Michigan Supreme Court in consideration of the public importance of the practices there examined, but the good faith of those who have succeeded in accomplishing the reform in the interest of larger and more easily collected awards for the children of divorced parents, maintained in custody apart from the parent responsible for the payments, does without question require something more than mere reference to the perilous silent rebellion resulting in the fall of birth rates.

That rebellion of course indicates that the tortured arguments of lawyers who have successfully sustained as legal the novel procedures introduced by social reform have not satisfied the public generally of the fairness of that procedure. It is their judgment disclosed by the increase in concubinage and the decrease in birth rates which warrants re-examination of the arguments of the lawyers.

We know that the office of the Friend of the Court in Michigan was created by the direction of the judges of the circuit court to lighten their labors. And we know by the published statements the millions of dollars the office so created has come to handle, and the vast personnel of office assistants and field workers built around it allied with a vast machinery of organized social workers intent upon increasing their field of activity. And we know from history how such vast disbursements of money create political organizations and power. But this defendant was in no position to prove, and was not permitted opportunity to prove, the extent to which the judges of the circuit court and supreme court of the state have come to be dependent on that organization for their election, tenure, and emoluments of office. The particular care with which by the Ordinance of the Northwest Territory, and the Constitution of Michigan, the people have sought to restrict the powers of their elective judges so as to bar them from invading the political fields of the executive department as a means of aiding their tenure of office appears a consideration to which attention is most difficult to obtain from the human being who is elected to office and hopes for re-election. For the court's convenience the following skeleton outline of all briefs filed in the Michigan Supreme Court in the instant matter, and praeciped as part of the record here on appeal, discloses most briefly the gist of argument and citations thereto:

SKELETON OUTLINE OF BRIEFS BELOW

BRIEF FOR JOSEPH METZINGER, APPELLANT

ARGUMENT—Preamble

Pages cited:

29 *Black on Const. Law*, 4th ed. Sec. 30 (duties of officials)

29 *Preamble to Mich. Canons of Professional Ethics* (duties of lawyers)

30 —a seasoned and traditional practice will nevertheless be held void.
Buchanan v. State (Ind.), 17 Alb. Law. Jour. 243, 25 Am. Rep. 619 at 620;

I.

31 **DEPRIVATION UNDER POLICE POWERS FOR PRIVATE USE**

33 —trivial amercements uphold notwithstanding 14th amendment:
6 R. C. L. 472-3; 475;
Gardner v. Michigan, 199 U. S. 325; 26 S. Ct. 106 (right to sell garbage);
Finley v. Barker, 219 Mich. 442 (unlicensed dogs to be killed);
Weimer v. Bunbury, 30 Mich. 201, 211 (generally).

36 —recovery on contract requires privity therewith;
Litchfield v. Garrett, 10 Mich. 426;
Pipp v. Reynolds, 20 Mich. 88;
Necker v. Harvey, 49 Mich. 517.

Pages cited:

—liability on contract only by some ratification;
Cunningham v. Irwin, 182 Mich. 629;
Hurley v. Watson, 68 Mich. 531;
Cowan v. Sargent Mfg. Co., 141 Mich. 87.

37 —statutory authority to modify decrees, and limitations;
Mich. C. L. 1929, Sec. 12739;
38 Mich. C. L. 1929, Secs. 14068; 14067; 14069;
Mich. Court Rules, 12(1) and (3); 13(1) and (3);
39 Mich. Court Rules, 27(2) (3) (4) (6); 14(1) (3) (4); 47; 48(1);
Tuthill v. Tuthill, 259 Mich. 272 (interpreting);
Pennoyer v. Neff, 95 U. S. (5 Otto) 714 (as to service of process);
Mich. Const. VII(5) (authority for rules of limitation);

40 *In re Dowling's Estate,* 308 Mich. 129; 13 N. W. 2nd 233, 236 (rule);

41 —rule applied to decree providing within its terms for revival;
In re Dowling's Estate, 308 Mich. 129; 13 N. W. 2nd 233 at 234;

42 *Petley v. Wayne Circuit Judge,* 124 Mich. 14;
Carpenter v. Judge of Superior Court for Grand Rapids, 126 Mich. 8;
(R. 62 cites also *Hughes v. Circuit Judge,* 239 Mich. 110 at 115)

42 —party litigant may not serve process;
Bush v. Meacham, 53 Mich. 574.

43 —privilege of challenging jurisdiction may not be denied;
Black on Const. Law, 4th ed., Sec. 234, p. 621;
6 R. C. L. 447.

II.

REFERENCE TO POLICE ACTION ON LIABILITY FOR PUBLIC CHARGE

Pages cited:

44 —requisites, to plead a statutory basis of discriminatory prosecution in public behalf;
Chandler v. Nash, 5 Mich. 409 at 416 (abrogating common law);

45 *Risser v. Hoyt,* 53 Mich. 185 at 192 (strict construction required);
Mays Criminal Law, Sec. 90, p. 73.

46 —essentiality of notice;
Mich. C. L. 1929, Sec. 14067;
Whalen v. Wayne Circuit Judge, 239 Mich. 482 (command to plead sufficient).

—essentiality repudiated by challenged statute and court rule;
Mich. Pub. Act 412 of 1919 as amended;
Wayne Circuit Court Rule 7-e.

47 —essentiality of charges to notice;
Dullam v. Willson, 53 Mich. 392 at 400, 407;
Cooley's Const. Limitations, 7th ed., pp. 526-7.

48 —limitations on police power;
Daugherty v. Thomas, 174 Mich. 371 at 386 (in private litigation);

51 **Pennoyer v. Neff, 95 U. S. (5 Otto) 714 (requiring personal process);**

52 *New International Encyc.* 2:773 (historical shift, tort to crime);

53 **Hurtando v. Calif., 110 U. S. 516; 4 S. Ct. 111, 116 (murder yet an Am. tort in 1765).**

53 —selection of public prosecuting attorney;
Mich. Const. IV (1) (2); VIII (3);
People v. Dickerson, 164 Mich. 148 at 153 (judge not to be advocate).

Pages cited:

55 —transfer of criminal prosecution to chancery discretion;
Staskiewicz v. State (Nebr.), 14 N. W. 2nd 184 at 185 (as contempt).

56 —imprisonment for tort of delinquent alimony in same prison as for crime;
Haines v. Haines, 35 Mich. 138; (civil contempt, no public prosecutor);
Bowman v. Wayne Circuit Judge, 214 Mich. 618; (conviction for (contempt barratrously aided);
Audubon v. Shufeldt, 181 U. S. 575, 21 S. Ct. 735 (not voidable in bankruptcy).

56 —involuntary servitude enforced by imprisonment only for crime;
U. S. Const. Amendments, XIII (1);
Mich. Const., II (8);

—only due process is required;
U. S. Const. Amendments XIV (1);
Mich. Const., II (16);
57 Mich. Const., II (8) (20).

58 —redress for tort is equally a "penalty" with redress for crime;
Daugherty v. Thomas, 174 Mich. 371 at 383-4 (auto collision).

59 —due process may not be avoided by calling proceeding administrative;
Ekern v. McGovern, 154 Wise. 157; 46 LRAns 796 at 827-8; 829; (ouster);
61 *In re Gilliland,* 284 Mich. 604, 613 (contempt partly outside the court).

62 —the public may rely for notice upon the title of a statute;
People v. Mahaney, 13 Mich. 494 (police act title broadly interpreted);

Pages cited:

Att'y Gen'l ex rel. Longyear v. Weimer, 59 Mich. 580 (county organization act);
Kent Co. ex rel. Bd. of Supervisors v. Reed, 243 Mich. 120 (an act void);
63 *Bissell v. Wayne Probate Judge,* 58 Mich. 237, at 239 (act limited by title);
Risser v. Hoyt, 53 Mich. 185 at 192 (act void).

—history of Friend of the Court,
Manual of County of Wayne, 1926, pp. 169-171.

—imprisonment for tort beyond mere inability to pay;
Stephenson v. Purchase, 214 Mich. 95 (capias ad satisfaciendum);
Bowman v. Wayne Circuit Judge, 214 Mich. 518 (conviction for (contempt; barratrously aided);
Carnahan v. Carnahan, 143 Mich. 390 (contempt for non-payment of trust fund).

63 —avoidance of jury representing public sense; rooted in official ego;
In re Chadwick, 109 Mich. 588 (contempt for letter on concluded decree);
64 *Stellar v. Stellar,* 25 Mich. 159 (contempt for mere inability reversed);
Carnahan v. Carnahan, 143 Mich. 390 (civil contempt for contumacious trustee);
Haines v. Haines, 35 Mich. 138 at 143 (civil contempt for contumaciousness).

65 —conviction for uncharged crime is void:
Ekern v. McGovern, et al., 154 Wisc. 157; 46 LRAns. 796; (governor's error);
Pennoyer v. Neff, 95 U. S. (5 Otto) 714 (unserved process).

67 —revival of litigation after period of limitation is void;
Mich. Court Rule 47;
Mich. Court Rule 48 (1);
Tuthill v. Tuthill, 259 Mich. 272 (interpreting rule 48).

Pages cited:

—conviction of crime not known to law is void;
Mich. Const. V (21);
Bissell v. Wayne Probate Judge, 58 Mich. 237 (on statute title, as notice).

—judicial enactment of legislation is void;
Mich. Const. IV (1)
68 Mich. Const. IV (2)
People v. Maki, 245 Mich. 455 at 491 (mere words of statute insufficient notice).

—courts shall be created by the legislature, not by judges of own cause,
Mich. Const. VII (2)

—and must be created as the people in their constitution commanded.
Attorney General v. Lacy, 130 Mich. 329 at 336 (voiding domestic court);
Mich. Const. VII (8).

69 —abuse of process will not be countenanced by courts of justice;
32 Cyc. 541

71 —judicial process, aided by barratrous maintenance, is *malum in se;*
Rex v. H. T. (A. D. 1635), King's Bench, 3 Mod. 97 (boarded common quarreler);
4 Petersdorff Abridg. Common Law Dig. (footnote) 158; 398;
74 *Backus v. Byron,* 4 Mich. 535 at 537; 539; 540; 545-6; 546-7; 548; (champerty).

75 —but the government is privileged to license crime by statute or decree;
76 Mich. C. L. 1929, Sec. 13600; licensing attorneys;
Fetters v. Wittmer Oil & Gas Properties, 258 Mich. 310 (barring laymen);

Pages cited:

Welles v. Brown, 226 Mich. 657 at 658 (barring attorneys as to divorce);

77 *Kelly v. Judge of Recorder's Court*, 239 Mich. 204 (barratrous solicitation);

77 —statistics relative to judicial supervision, 1897 to 1938,
Matrimonial Shoals (1939), Detroit Law Book Co., pp. 70-75;

78 *Hightower v. Detroit Edison Co.*, 262 Mich. 1 at 7-8 (barring solicitation).

80 —acquired partisan interest of elected judge in the licensed barratry, whereby to maintain political machine to secure re-election,
The American Commonwealth, 1916 ed., II, Part V, Chap. 89, p. 407. J. Bryce.

81 —mutual dependence of advocate and judge forbidden;
Mich. Const. VIII (3);
People v. Dickerson, 164 Mich. 148 at 153 (judge not to be advocate);

82 —layman may not be elected or appointed in place of attorneys;
People ex rel. Hughes v. May, 3 Mich. 598, 600 (voiding election of layman).

83 —constitutional mandate may not be displaced by statute;
Chandler v. Nash, 5 Mich. 409, 418 (judicial chamber duties denied notaries).

Pages cited:

III.

83 **CONSTITUTIONALITY OF EMPOWERING CHANCERY REFEREES**

85 —analysis of challenged statute and court rule:
86 Michigan Public Act 412 of 1919 as amended by Act 306 of 1939;
Wayne Circuit Court Rule 7-e (full text of each at pp. 248-250).

88 —duties as prosecutor of Friend of Court;
Fifth Ann. Rep. of Judicial Council of Mich., pp. 61-7.

—divorce suit is permissible in law court; as well as in chancery,
Mich. Comp. Laws, 1929, Sec. 12728.

—advantages tendered plaintiff by barratrous combination in chancery:
Brown v. Kalamazoo Circuit Judge, 75 Mich. 274 (jury avoided).
90 —inquisition of defendant unprotected by legal counsel is abuse of process;
State v. Pancoast, 5 N. D. 514; 35 LRA 518 at 532 ("might be reversible error");
People v. Lauder, 82 Mich. 100, 142 (minority: "an outrage");
91 *Canons of Professional Ethics No. 9* (on ignoring defendant's counsel).

—bills of discovery are proper in strictly civil litigation in open court;
Pye v. Butterfield, 5 Best & S. 837;
92 *Mulhern v. Kent Circuit Judge,* 111 Mich. 528 (voiding chamber action);
Hunt v. Wayne Circuit Judges, 142 Mich. 93 (Act for chamber discovery again voided).

Pages cited:

95 —litigant has right to knowledge of every step in judicial investigation of issue regarding which he is in court;

96 *Watertown Bank & Loan Co. v. Mix,* 51 N. Y. 558 (note by judge to jury);

Canons of Professional Ethics, No. 3 (secret conference of judge and attorney).

99 —due process is not satisfied by mere form, record, and ritual;

6 R. C. L. 437;

Hightower v. Detroit Edison Co., 262 Mich. 1, at 10 (concealed barratry);

104 *Your Life Is Their Toy—Rackets, Social Service and Medical,* by Dr. E. M. Josephson (1940), Chedney Press, N. Y. C.

106 —state legislature may establish inferior courts, Mich. Const. VII (1);

—but judges may not be judges in own cause of leisure and re-election by appointing executive or administrative substitutes to function additionally in election campaigns,

107 Mich. Const. IV (1) (2);

—nor may legislators so endow the judges,

Brennan v. Recorder of Detroit, 207 Mich. 35 at 39 (judicial duties compelled);

Zimmer v. Supervisors of Bay County, 159 Mich. 213 at 217-8 (Act voided);

Attorney General v. Lacy, 180 Mich. 329 (substitute for constitutional court voided);

1926 Manual of the County of Wayne, p. 170 (executive function returned to its office).

109 —statutory displacement of courts by police officers held to be denial of due process;

Black on Const. Law, 4th Ed., Sec. 234, p. 618;

Pages cited:

110 Mich. Const., VII (1); IV (1) (2);
15 R. C. L. 521;
People v. Margelis, 246 Mich. 459, 463 (requiring judge in open court);
Ellerbee v. State, 75 Mich. 522; 41 LRA 569 and note (absence of judge);
Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 285 (on shifting duties);

111 *State of Indiana ex rel. Hovey v. Noble*, 4 LRA 101, 108 (judge's duties);
Risser v. Hoyt, 53 Mich. 185, 193 (Act empowering Cir. Court Commissioners void);

112 *Rowe v. Rowe*, 28 Mich. 356 at 357 (voiding habeas corpus hearing by circuit court commissioner);

113 *Streeter v. Paton*, 7 Mich. 341 at 352 (distinguishing duties discretionary and at strict law);

114 —legislative function to create officials denied elective judiciary due process;
Mich. Const. VII (8)

115 Mich. Const. VII (1)
People v. Murray, 89 Mich. 276, 291 (forbidding subterfuge: requiring public trial);
Att'y Gen'l v. Lacy, 180 Mich. 329, 341 (statute void as a subterfuge);
Brennan v. Recorder, 207 Mich. 35, 39 (relief of courts by subterfuge voided);

116 *Risser v. Hoyt*, 53 Mich. 185, 208 (substitution of chamber for open court voided);

117 **Roller v. Holly, 176 U. S. 398 (summons subjecting to mere unregulated discretion void);**
Cooley's Const. Lim., 7th ed., pp. 572-3.

120 —a proceeding constituted to favor plaintiff denies due process;
Magna Charta, Sec. 40.

Pages cited:

121 —ostensible impartiality of prosecuting attorney is affective only to bar the joining of a civil and a criminal prosecution under same action;
Meister v. People, 31 Mich. 99 (reversing conviction aided by attorney for insurance Co. liable in absence of arson);
Sheed v. People, 38 Mich. 248 (reversing murder conviction aided by attorney employed by prosecuting witness);
People v. Bemis, 51 Mich. 422 (sustaining conviction aided by attorney employed by legislative body).

122 —conceded joinder of civil and criminal prosecution as usual practice under challenged statute, and interest, disclosed;
125 *Fifth Annual Report of the Judicial Council of Michigan, 1935.*

127 —interest to decide arbitrarily denies due process of law,
Cooley's Const. Lim., 7th ed., p. 594;
Panasewich v. Panasewich, 256 Mich. 356 (offer by decree of children with support to proven adultress).

129 —judicial referees forbidden respecting matters of discretion; history;
130 Mich. 1908 Const., Art. VII (5);
Mich. 1850 Const., Art. VI (5);
Intro. to *Hoffman's Master in Chancery*, p. xvi.
Mich. Const., VII (1);
Risser v. Hoyt, 53 Mich. 185 (voiding act expanding chamber powers to include court duties);
131 *Attorney General v. Lacy*, 180 Mich. 329 (substitute for constitutional court voided);
Mich. Const. VII (6) (11); VIII (3);
Mich. 1835 Const. VI (5); 1850 Const., VI (12); X (3);

Pages cited:

132 —claim of prosecuting attorney to be authorized as notary to hear is error;

133 *Chandler v. Nash*, 5 Mich. 409 at 417-8 (voiding substitution for constitutional officer).

133 —transfer of action to law side of court to permit reference does not permit reference except to an elected commissioner;

Chandler v. Nash, 5 Mich. 405 at 418 (voiding substitution of appointed referee for constitutional elected referee);

134 *McClintock v. Laing*, 19 Mich. 300, 304 (voiding statute substituting city official for a county circuit court commissioner);

Att'y Gen'l v. Lacy, 180 Mich. 329 at 342 (voiding transfer of duties from constitutional officer to statutory officer);

Mich. Const. IV (1) (2);

135 Mich. Const. VIII (3); VII (11).

136 —Michigan constitution has forbidden usurpation of such political power by her elected judges as appointive clerical staffs would constitute;

McClintock v. Laing, 19 Mich. 300 at 304 (aids to be elected);

Chandler v. Nash, 5 Mich. 409 (elected officers not to be displaced under statute providing for appointed substitutes);

—but judicial interest continually seeks substitution, history:

Fifth Ann. Rep. of Judicial Council of Mich., p. 61.

137 *McClintock v. Laing*, 19 Mich. 300, 303 (history of commissioners);

Mich. 1850 Const. VI (16);

Mich. 1908 Const. VII (21);

Mich. Const. Convention of 1850—Debates, pp. 809-812;

Pages cited:

139 *23 Cyc.* 1123;
Hoffman's Masters in Chancery, 1824 ed.;
First Rep. British Chancery Comm., 1852, pp. 31-58 *et circum;*
Ency. of Laws of Eng., 8:274 *et circum;*
140 *Holdsworth's Hist. Eng. Law*, pp. 444-5 *et circum;*
Lect. on Eng. Law Reform, Counc. Leg. Educ. Linc. Inn, 1900-1901, p. 226;
Bay City v. The State Treasurer, 23 Mich. 499, 506 (taxes voted in aid of powerful political influence under authorizing statute held void —"constitutions do not change");
Bouvier's Law Dictionary (history of masters);
141 **Kimberley v. Arms, 129 U. S. 512 (discretion may not be referred to master);**
142 *Brown v. Runals*, 14 Wisc. 693, 698-9 (const. requires open court on forbidding masters to the court);
Noonan v. Orton, 5 Wisc. 60;
Oatman v. Bond, 15 Wisc. 20;
Killingstad v. Meigs, 147 Wisc. 511.

—a master may substitute for the court only on stipulation for arbitration, or on no objection;
Mich. Comp. Laws, 1929, Sec. 13709;
10 R. C. L. 507; 510-511;
143 *Fifth Ann. Rep. Jud. Council of Mich., 1925*—p. 63.

144 —at neither law nor chancery may discretionary duties be referred over objection;
Mich. Comp. Laws, 1929, Sec. 12728;
Mich. Const. VII (21);
145 *Underwood v. McDuffee*, 15 Mich. 361 at 366, 369 (judgment by stipulated referee reviewable only on points of law);
Mich. Const. VII (5);
146 *Frank v. Schultz*, 295 Mich. 714, 716 (minority *obiter dictum);*

Pages cited:

Mich. 1850 Const. VI (5); 1908 Const. VII (5);
3 Cyc. 589-90;

149 *Brown v. Kalamazoo Circuit Judge,* 75 Mich. 274 at 284-5.

151 —unconstitutional interference by judicial naming of prosecuting attorney, who is then required under challenged statutes to be authorized by governor, denies due process;
Mich. Act 412 of 1919, Sec. 1, as amended by Act 306 of 1939;
Mich. Const. VII (11);
Attorney Gen'l v. Lacy, 180 Mich. 329, 341 (voiding transfer of duties from constitutional officer);
Brennan v. Recorder, 207 Mich. 35 at 39 (compelling constitutional duty).

IV.

ARBITRATION NOT STIPULATED

153 —stipulation by default would involve legal service of process, ruled out;
Bush v. Meacham, 53 Mich. 574 (litigant may not judge own process served).

V.

MATTERS ADJUDGED NOT TO BE REOPENED

155 —prior order in cause dismissing for interest a motion for reference to Friend of the Court Pokorny concludes that issue;
34 Cyc. 1666;
Wisconsin v. Torinus, 28 Minn. 175, 179; 9 N. W. 725;
156 *23 Cyc.* 1121; 1223;
157 *Wayne Circuit Court Rules* 7-i;
158 *10 Ruling Case Law,* 262.

Pages cited:

VI.

159 **RIGHT TO FULL RECORD IN OPEN COURT**

160 —defendant with his matter at issue by answer was denied due process by dismissal of his suit with hearing granted only to his antagonist;
Mich. Comp. Laws, 1929, Sec. 14335;
161 *16 Cyc.* 462-3;
McVickar v. Filer, 24 Mich. 241 (dismissal not legal while demurrer pends);
162 *Brown v. Kalamazoo Circuit Judge,* 75 Mich. 274, 281 (barring several discretionary determinations in a single cause);
Mich. Const. VII (5);
163 *Whipple v. Stewart,* Walker (Mich. 357) (one legally under the court's process need not be served an order of reference).

—notice served only on attorney appearing specially is not notice;
164 *6 R. C. L.* 448;
Montgomery v. Henry, 10 Mich. 19 at 20 (un-notified alleged sureties not liable upon a substituted copy of original bond).

—subpoena to one to testify as a witness is not notice of suit to him as defendant;
Stoeckle v. Ehlers, 37 Mich. 261 at 262 (determination so notified void);
165 *Probate Judge v. Abbott,* 50 Mich. 278, 286 (consent to jurisdiction by an un-named attorney for executor, and unproved allegation of publication, sustain no personal jurisdiction over sureties to bond on creditor's suit, even if proved, being mere constructive notice).

—but even if personal jurisdiction existed, denial of due hearing voided it;
6 R. C. L. 451;

Pages cited:

167 **Windsor v. McVeigh, 93 U. S. 274, 277-8, 281, 283-4 (hearing denied on due notice had, and judgment held void);**

Ekern v. McGovern, 154 Wisc. 157; 46 LRAns 796, 855 (void ouster by governor);

Hilton v. Briggs, 54 Mich. 265, 268 (assumption of administrator's presence in court held an ineffective fiction);

Jewett & Jarvis v. Perkins, 41 Mich. 689 (order vacating mortgage sale set aside for failure to summon purchaser as party);

Watson v. Hinchman, 41 Mich. 716 (proceedings changing an obligation after judgment held void for lack of notice to defendant who had appeared and withdrawn plea);

Austin v. Register of Deeds, 41 Mich. 723 (mandamus to compel a deed left in escrow with defendant to be recorded, denied for lack of hearing to alleged grantor);

168 *Noyes v. Hillier*, 65 Mich. 636 (judgment in attachment for labor lien on logs set aside for lack of service on owner, lack of evidence authorizing substituted service on agent, lack of reasonable time to agent).

VII.

168 **DUE PROCESS**

169 —facts beyond mere injustice warranting attention to lack of due process guaranteed by the 14th Amendment to the United States Constitution are properly cited first upon published authorities not affected by the instant appeal:

Matrimonial Shoals, by Rood (1929), Detroit Law Book Co., Detroit, p. 73 and Chapt. VI (statistical analysis of 40 years disclosing 300% to 400% increase on divorce keyed in different

Pages cited:

localities to different dates coincidental with establishment of specialized domestic relations tribunals operating by star chamber methods lacking due process, and affecting birth rates comparably);

170 *Bureaucracy Runs Amuck, by Sullivan,* Detroit Times ed., May 27, 1944, p. 2-C (disclosing financial interest in operating by system denying due process);

171 *Fifth Ann. Rep. Jud. Counsel of Mich.—1935,* pp. 62; 130; 91; 86 (further disclosing financial interest in operating by system denying due process, and opportunity for effective results of denial);

174 *U. S. Const. Amend. XIII and XIV; Mich. Const. II* (8), (16)—indicating possible source of public reaction so disturbing to those concerned with military security in the event of a future war based perhaps on economic and racial antipathies rather than governmental antipathies (perhaps in the nature of civil war based upon foundations of international cartels capitalizing racial differences if the United Nations program succeeds);

Matrimonial Shoals, pp. 73-77; 115-117; (further statistics);

The Principle of Population, Thomas Mathus, 7th ed., Vol. IV, c. 13 (emphasizing the perils of unwise political charity);

176 *Mich. State Bar Journal,* Article by Judge Robert M. Toms (emphasizing the need for at least some occasional reference to actual results in measurable form).

177 *Weimer v. Bunbury,* 30 Mich. 200 at 213—that due process is merely recognized common custom, and common law.

179 —the source of right to due process,—merely reassured in 14th Amend.;

Ekern v. McGovern (Wisc.), 46 LRAns, 796 at 829—quoting Lord Campbell;

Pages cited:

U. S. Const., 14th Amend.;
Mich. Const. II (8) (12) (16);

180 *People v. Dickerson,* 164 Mich. 148 at 152;

181 *Black on Const. Law,* 4th ed., Section 230, pp. 591, 592, 593, 596, 597, 598;

182 —defendant is "entitled to a trial of his litigation before an impartial judge sitting as a court, competent to decide";

184 *Black on Const. Law,* 4th ed., Sec. 234, p. 616;
Mich. Const., VII (1).

—the judge has no power to appoint "experts" upon whose statements and recommendations, testimony and motions, he feels warranted especially to rely rather than upon the representations offered by the counsel for litigants;

185 *People v. Dickerson,* 164 Mich. 148 at 153-5 (voiding statute authorizing practices practically identical with those of Friend of the Court as shown by the record,—history:)

187 *Fifth Ann. Rep. Jud. Council of Mich., 1935*—p. 64;
Att'y Gen'l v. Lacy, 180 Mich. 329 at 341 (voiding the second statutory attempt in same direction enacted by the legislature elected next after the Dickerson decision, whereby history continued:)

188 *Fifth Ann. Rep. Jud. Council of Mich., 1935*—p. 64-5 (disclosing the third step as a decision by the Mich. Sup. Ct. nullifying a 30-year old statute requiring the constitutional prosecuting attorney to be notified in domestic relations matters pending in court:)
Cole v. Cole, 193 Mich. 655 (permitting thus the transfer of constitutional duties from the constitutional elected public attorney to a public attorney appointed by the judges to head the social workers' organized efforts — and

Pages cited:

powerful election machinery needed by the judges of both the circuit and Supreme courts to aid their re-election regularly to their tenure and emoluments of office);

Firth Ann. Rep. Jud. Council of Mich., 1935, pp. 61 and 63 (disclosing the creation of local political machinery so authorized, and which was ratified by state enactment of the legisnature next elected, by which only names were changed);

Mich. Pub. Act 412 of 1919;

189 *Fifth Ann. Rep. Jud. Council of Mich., 1935*, p. 95.

189 —"The office still performs the same functions of the prosecuting attorney as advocate of the people's interest against parties in actions purporting to be civil rather than criminal, but the interest of the people nevertheless, and armed with penalties of imprisonment, notwithstanding its incumbent is no longer accountable to the voters at biennial county elections as required by the state constitution," and giving no notice whatsoever to the defendant of the charge upon which prosecution in the public interest is based, and otherwise operating illegally by special legislative and judicial license, and in manner denying every due process:

Mich. Pub. Act 306 of 1939 (amendment requiring Governor to appoint and other changes; but not releasing power of circuit judges to control nomination and personnel of staff);

Mich. Const. Art. VIII, Sec. 3;

Hughes v. May, 3 Mich. 598 (holding laymen may not serve as attorneys in court representing public interests);

190 *People v. Dickerson*, 164 Mich. 148 at 153 (function executive, not judicial).

191 Mich. Const. Art. IV (1) and (2);

Hurtando v. California, 110 U. S. 516; 4 St. Ct. 121 ("Security for due process")

Pages cited:

191 —in violation of the Constitution of the United States (and particularly Amendment 14, Sec. 1), the Ordinance of the Northwest Territory (Art. II of Sec. 14), and the Constitution of Michigan (particularly Art. IV, Sec. 2), each designed to guarantee to all persons accused by the public prosecutor due process of law, including speedy public trial by a disinterested, unbiased, impartial, and duly organized court with jury, the circuit court in this case demanded, and the Michigan Supreme Court confirmed; that defendant appellant submit to the reference of this cause to the Friend of the Court, in chancery, under the statute being discussed,—an office created at the instance of the circuit judges to ease their labors and constitute under their own control an efficient political machine to aid their re-election to the emoluments of office; which reference said elective judges determined in their own behalf in this cause not to violate said mandates prohibiting said judges from substituting such political machine to prosecute and hear defendant appellant in place of the public attorney provided by the people to be independent of said judges, and expressly forbidding said elective judiciary to "exercise the powers properly belonging to another" department;

Mich. Const. Art. VII, Sec. 11;

192 *Sparks' Life of Gouverneur Morris*, III:8;

193 *Losing Liberty Judicially, Thomas James Norton* (1928), p. 134;

Univ. of Penn. Law Review, Article by Prof. John Dickinson on the Acheson Report, 1942, May, p. 771;

194 **Hurtado v. California, 110 U. S. 516; 4 S. Ct. 111 at 121 ("a despotism of the many—of the majority, if you choose to call it so—but it is nevertheless a despotism");**

Pages cited:

Mich. Pub. Act 412 of 1919 as amended;

197 *People v. Dickerson,* 164 Mich. 148 at 153-5, at which page of the brief here outlined is remarked that said denial of due process is "**incapable of any cure at all so long as the Friend of the Court is permitted any kind of favor whatsoever beyond that of an ordinary prosecuting attorney in a purely criminal proceeding**"—(including thereby trial by jury at defendant appellant's option as due process under the 14th amendment ratifying the Ordinance of the Northwest Territory, Article II of the Articles of Compact in Section 13, although jury has not yet been demanded in the instant litigation).

198 —The right to defendant appellant to an impartial tribunal thereby violated is fundamental;

Ames v. Pt. Huron Log Driving & Booming Co., 11 Mich. 139 (voiding a statute creating "a species of river police" interested financially against the owners of logs);

199 *Peninsular Ry. Co. v. Howard,* 20 Mich. 18 (stockholders on jury assessing land taken by eminent domain render the determination so absolutely void that "**it may be raised in the Appellate Court for the first time,**" cfting authorities);

Cooley's Const. Lim., 7th ed., p. 592;

201 *Zimmer v. Supervisors of Bay City,* 159 Mich. 213 at 219-20 (voiding a statute by which a minority of supervisors may create and control an appeal committee for review of tax assessments);

Sullivan v. Haug, 82 Mich. 548 at 553 (drafting a list of rights guaranteed as a part of due process, every one denied in the instant appeal discussed in this brief).

Pages cited:

—the right of defendant to trial in a court "controlled by definite and regular rules of practice assuring a reliable record" is a due process peculiarly associated with right of impartial tribunal in matters involving any degree whatsoever of discretion; since upon review of such hearings the question is strictly whether there be any matter in the record whatsoever sustaining the determination reviewed, which, if present, will bar reversal: and, that such hearing be conducted by known regular practice governed by known rules, is the only distinction between a purely arbitrary government by men and a just government by law assuring a reliable record;

202 *2 R. C. L.* 206-7; 211; (applicable to Friend of the Court, as demonstrated by statistical results:)

203 *Fifth Ann. Rep. Jud. Council of Mich., 1935*,—p. 93 (at which page of the brief here outlined appears reference to the denial of right to the defendant appellant "to make a record" (R. 71) or even be heard orally (R. 33), concerning which the record at p. 40 is particularly pertinent,—that this is the general practice under the challenged statute; regard to orders to show cause why imprisonment for contempt should not be imposed, and with regard to the petitions instantly under consideration prior to such order to show cause);

204 *Parsons v. Russell*, 11 Mich. 113 at 120 (voiding statute authorizing warrant of court commissioner for seizure and sale based on plaintiff's affidavit supplied in absence of, and failing to accord with, "some universally established practice of courts");

206 *Risser v. Hoyt*, 53 Mich. 185 at 209 (voiding statute expanding chamber powers on ground "The Act does not provide for rules of court . . .

Pages cited:

confusion and doubt would attend every effort to proceed; . . . as likely to . . . assist fraud as to circumvent it.");

207 *Underwood v. People,* 32 Mich. 1 at 5-6 (voiding statute for incarceration in insane asylums for failure relative to discharge to provide protection from the unregulated discretion, whim, caprice, and "uncontrolled pleasure" of the officers);

Dullam v. Willson, 53 Mich. 392 at 409 (on dismissal of *quo warranto,* "Private rights cannot be subjected . . . to the unregulated discretion of anyone.")

Roller v. Holly, 176 U. S. 398; 20 S. Ct. 410 at 413-15 (that defendant was not required to respond to a summons where the court operated under no rule assuring defendant of due process,—**"Very probably the court which rendered the judgment would have set the same aside and permitted him to come in and defend; but that would have been a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest on a basis more substantial than favor or discretion."**—applicability of which is sustained by conceded finality of the highly irregular practice:)

208 *Fifth Ann. Rep. Jud. Council of Mich., 1935,*—pp. 68, 89 (and see R. 40),—showing thereby general practice of subjecting defendant to inquisition lacking aid of counsel and permission to cross-examine witnesses or know what is presented against defendant, all in direct repudiation of due process:

209 **Hurtado v. California, 110 U. S. 516; 4 S. Ct. 111 at 122.**

210 —the right of "trial by regular and orderly procedure" is a fundamental right, by which only can be assured the defendant appellant's equal "right to trial in open court,"

Pages cited:

equally denied him; neither of which rights can be assured in absence of the other; and both essential to the assurance of honesty on the part of the judge, and to security of the government:

212 *People v. Micalizzi*, 223 Mich. 580 at 582-5: (reversing a star chamber conviction maintained under prosecution by public officials in the purported public interest,—**"If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors. If one constitutional right may be violated with impunity, all may be, and the bill of rights becomes but a scrap of paper.")**

Tabor v. Cook, 15 Mich. 322 (voiding a purported equity action in a matter that required recognition of customs in the vicinage);

213 *People v. Murray*, 89 Mich. 276 at 291 (reversing conviction for crime not conducted in sufficiently public manner, quoting *Cooley's Constitutional Limitations*, ". . . that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their function.")

213 —an officer tainted with police functions cannot be constitutionally authorized to conduct a judicial hearing. No rules or regulations can correct such a procedure,—"The right of obedient parents not delinquent in payments under a divorce decree to know of what charges involving the public interest they are accused warranting police action against them, and to have a hearing which will give them means of fairly meeting the charges would seem reasonable. Without this there can be neither fairness nor uniformity in the operation of the law. If no standards are

Pages cited:

laid down, there may be as many scales of fitness as there are Friends or Assistant-Friends of the Court. We have already had occasion to discover that tribunals desirous of effectuating a private policy are ingenious in finding faults. There are very many excellent people who regard every man sued for divorce as a bad man, unfit for social privileges, and others who hold peculiar views on other topics, which would render them harsh censors. If the statute had fixed the rule as to what constituted liability to become a public charge, and what constituted relief therefrom, there would be some means of protecting parties against caprice and condemnation unheard. But when the same persons are to be judges of the liability to become a public charge, as well as of the fitness of parents for custody, the law subjects every man to the mere will of neighbor police, and gives him no rights whatever. No man's right can be submitted under a constitutional government to the discretion of anybody." One cannot be both antagonist and judge;

214 *Robinson v. Miner and Haug,* 68 Mich. 549 at 555-6 (from which case the quoted language preceding from the brief here outlined was lifted almost verbatim to constitute defendant appellant's objection to the court's jurisdiction as to the points therein raised,—the Robinson-Minor decision involving mandamus for a liquor license);

215 *Sheldon v. Kalamazoo,* 24 Mich. 383 at 385-6 ("If a municipal board can finally determine that a highway already exists over private lands, there can be no security whatever against unlawful seizures.")

216 *Pearsall v. Supervisors,* 71 Mich. 438 at 445 ("Neither necessity nor compensation can be deter-

Pages cited:

mined by legislative or municipal authorities.")

—that one may not judge his own cause, is a fundamental rule of due process repudiated by the determination in the instant matter, illegally depriving defendant appellant of his right to an impartial, disinterested, and unbiased tribunal, as appears from the official statement of policy maintained by the Friend of the Court under the statute challenged, whereby the petition of defendant appellant for the custody and services of his 15-year old son is notified to be granted only if the boy's present home with his mother is "absolutely intolerable" in the judgment of the police officer held (R. 23-5) by the order of Judge Moynihan to have barratrously stirred up the action in the name of Louise Metzinger in the hope of having it referred to his office as a part of the stream of business maintaining his employment, his staff, and his salaried prestige:

Fifth Ann. Rep. Jud. Council of Mich. 1935, p. 103;

Prince v. Clark, 81 Mich. 167 at 169 (voiding a determination for incompatible representation of the minor feeble-minded defendant).

217 —denial of the right of cross-examination is denial of a due process recognized as fundamental since the dawn of civilized legal procedure;

IV Blackstone's Commentaries,— 359, 360;

218 *Dullam v. Willson,* 53 Mich. 392 at 414 (:that failure of statute to require the governor sitting as judge in removal proceedings to recognize the right of cross-examination does not exempt him from the duty):

Pages cited:

Ekern v. McGovern, 154 Wisc. 157; 46 LRAns 796 at 844-5 (action by governor removing official must be according to due judicial process, including right of cross-examination).

219 —denial of defendant appellant's right to be present throughout the judicial investigation of the matter upon which he was in court was a shocking denial of due process, characteristic however of the entire procedure held by the court to be authorized under the statute challenged;

Ekern v. McGovern, 46 LRAns 796 at 841-2; 839; 835.

VIII.

223 **ISSUE OF PREJUDICE**

—the right of defendant appellant to trial of his matter before an impartial tribunal, means that the judge must be disinterested, unbiased, and unprejudiced, for the reason that otherwise the litigant is actually not heard, nor his facts and argument granted attention. His right is deemed waived if not asserted seasonably by any challenge on the point he may care to urge; but if urged before entering general appearance, and at first opportunity, that is held to be timely. Objections on the point thus seasonably made, evidenced by the record itself as to the occasion, cause, and degree of interest, bias, and prejudice, with citations to the record demonstrating same, appear sustained by legal authorities as voiding the jurisdiction of the court;

224 Mich. Const. II (15);
U. S. Const., Amendments, XIV (1);

Pages cited:

225 *Hoffman v. Newell,* 20 N. Y. Supp. 432 at 433 (defining duty to hear);

Crucia v. Behrman, 197 La. 137 at 142; 84 S. 523 (defining "hearing");

226 *State ex rel. Hughes v. Milholland* (N. Dak.), 195 N.W. 292 at 295 (that a hearing means "not merely the privilege to be present when the matter is being considered, but the right to present one's contention, and to support the same by proof and argument.";

Crane v. Reeder, 28 Mich. 527 at 535 (applies to both chancery and law);

Denver v. State Investment Co. (Colo.) 33 L.R.A. ns 395 at 398-9 (voiding a determination where testimony was refused, as being a denial of hearing);

Record cited at pages 33; 34; 35; 36-7; 37-8; 100; 118; 114; 105; 110; to sustain quotations set forth as evidence of "determined pre-judgment"

232 *Fifth Ann. Rep. Jud. Council of Mich., 1935*—sustaining the political interdependence for tenure of office and emoluments thereof between the Friend of the Court and the elected judges of the circuit and supreme courts—submitted to the judicial notice of the appellate court, but provided as to the election of the judges by Mich Const. VII (2) and (8);

The Four Georges, Wm. Makepeace Thackery, Log Cabin ed. p. 60—on source of tyranny—: "by persons believing themselves in the right";

233 *The New Despotism,* Lord Chief Justice Hewart (1929), p. 157—"worst disorder of the state"

234 *The Montgomery Ward Case & Constitution,* Congressional Record, speech by Sen. Moore,

Pages cited:

Vol. 90, No. 97, p. A2835, May 29, 1944; (on "war against the integrity of words");
Preamble to Common Canons of Professional Ethics.

IX.

NATIONAL DEFENSE AN ISSUE

—This issue possibly may excuse, as mere injustice to an individual for a couple or three years could not, the petition hereby for the attention of the busy United States Supreme Court. A well meaning reform in judicial procedure based upon the most kindly charitable considerations history has recognized, appears to have had astounding results in an unexpected field seriously imperiling the military security of the nation, however successfully the present program for post-war peace and prosperity may temporarily appear to have been secured. The peril in a third war that appears authoritatively expected, even though it may next time be founded upon the economic interests of international cartels capitalizing racial animosity in the nature of civil war beneath a United Nations cover, has been suffiicently indicated in the reasons hereinbefore presented for considering this petition, and the following authorities cited from the brief:

236 *The Mind and Society,* by Vilfredo Pareto (1935) English translation;

Associated Press (Detroit Free Press, p. 1, July 10, 1944);

237 *Newsweek Magazine,* July 17, 1944, p. 42;

Statistical Abstract of the United States, 1940, p. 88;

Pages cited:

Studies in American Demography, Prof. Willcox (1940), Cornell Univ. press, p. 292;
Inner History of the Chinese Revolution, by T'ang Leang-Li (1930), p. 26;
238 *The World Almanac,* 1942, p. 244;
240 *Am. Bar. Jour.,* August, 1940, p. 681.

APPENDIX

246 *Michigan Constitution,* pertinent sections.
248 *Friend of the Court Act,* Mich Pub. Act 412 of 1919 as amended by Act 306 of 1939.
250 *Wayne Circuit Court Rules* 7 (e) and (i).

OUTLINE OF BRIEF FOR LOUISE METZINGER, APPELLEE

1 —counter-statement of facts alleges prolixity, and attempts shorter statement.

5 —divides labor with Friend of the Court and presents as the sole issue: constitutionality of action—"Whether (1) the appellant has a right to the trial of his litigation in a single proceeding in an open circuit court (2) on due notice and (3) in the presence of the constitutional judge, notwithstanding the statute creating the Friend of the Court."

I.

—appellant did not have the right to trial in open court upon petition filed to modify provivions of final decree;
6 Record, p. 6-7, (clause in final decree providing "until the further order of the court");

Pages cited:

M.S.A. 25.97 Sec. 17 (Mich. Comp. Laws, 1929, Sec. 12739 as amended);
Michigan Supreme Court Rule 10;
7 *Tuthill v. Tuthill,* 259 Mich. 272 (declining to treat petition as an original bill).

II.

—it is not necessary to give notice of hearing on petition to modify the decree by rule to plead, writ of summons, order to show cause, or citation, as in original suits;
8 *Ledyard's Appeal,* 51 Mich. 623;
Southern Bank v. Byles, 67 Mich. 296, pp. 305-6.

OUTLINE OF BRIEF FOR FRIEND OF THE COURT

1 —"pivotal question"—"Is the Act creating the Office of the Friend of the Court Unconstitutional?"

2-7 —history and statistics relating to institution, citing:
2 *Attorney General v. Lacy,* 180 Mich. 329 (voiding a Domestic Relations Court);
3 *Ex parte Guernsey,* 21 Ill. 450 (noticing *Amicus Curiae);*
Mich. Pub. Act 412 of 1919, amended in 1939;
5 Wayne Circuit Court Rule 25;
Mich Compiled Laws of 1929, Sec. 12774;
7 Mich. Pub. Act 412 of 1929 as amended by Act 306 of 1939.

—function of Friend of the Court as a stipulated referee is legal;
Mich. Comp. Laws of 1929, Sec. 13709;
8 *Frank v. Schultz,* 295 Mich. 714;
Mich. Comp Laws, 1929, Sec. 14465;
Crone v. Angel, 14 Mich. 340 at 346, footnote.

Pages cited:

10 —"It has been the practice for over 27 years in the Wayne County Circuit Court for the bench and bar to accept the aid and assistance of the Friend of the Court";

Sims v. Sims, 298 Mich. 491;
Riede v. Riede, 300 Mich. 300;
Wright v. Wright, 223 Mich. 224;

11 *Felske v. Felske,* 257 Mich. 356;
Broadwell v. Broadwell, 260 Mich. 453;
Poxson v. Poxson, 260 Mich. 625;
Smith v. Smith, 252 Mich. 543;
Sickenberger v. Sickenberger, 290 Mich. 467;

12 *Sarazin v. Holton,* 247 Mich. 333;
Richardson v. Richardson, 273 Mich. 296;
Weiser v. Circuit Judge, 247 Mich. 52;
Pusylo v. Pusylo, 279 Mich. 623;
People v. Salsbury, 134 Mich. 553.

13 —the Friend of the Court is not a master in chancery, but is created as have various boards been created, in answer to progress in our way of life and the demands of the public, having duties quasi-judicial, but without power to perform final judicial acts;

14 *Frank v. Shultz,* 295 Mich. 714 (friend of the court not a master);
Bd. County Comm. v. Cypret, 65 Okla. 168 (distinguishing quasi-judicial acts);
State v. Burdick, 3 Wyo. 588 (auditing not a judicial function);

15 *State of Ohio v. Creamer, State Treasurer,* 39 LRAns 700 (distinguishing administrative acts);

16 *Bari v. Struck,* 62 LRA. 483 (quasi-judicial duties);

17 *Mackin v. Detroit Timken Axle Co.,* 187 Mich. 8 (distinguishing administrative and quasi-judicial duties);

19 *Kennedy v. St. Board of Registration and Medicine,* 145 Mich. 241;
Zimmer v. Bd. of Supervisors, 159 Mich. 213;

Pages cited:

Albert v. Gibson, 141 Mich. 698 (that statutes must be construed as constitutional if possible);

20 *Erwin v. Pokorny* (unreported)—denying leave to file *quo warranto* information, with parenthetical explanation that the friend of the court act has been amended to provide appointment by the governor in place of by the prosecuting attorney.

OUTLINE OF REPLY BRIEF FOR JOSEPH METZINGER

1–2 —noting two months opportunity for meeting appellant's brief on appeal, duly answered.

I.

REBUTTAL TO BRIEF FOR LOUISE METZINGER

2 —noting division of issues arranged with prosecuting attorney.

—on right of hearing in open court; noting that the only case cited disclosed a futile attempt 15 months after a final decree to obtain a rehearing upon no charge of fraud;

3 *Tuthill v. Tuthill,* 259 Mich. 272.

—on prerequisite nature of order to defend: "there must be sometime an end to litigation,"

Hughes v. Circuit Judge, 239 Mich. 110 at 115 (whereby at least a new notice is required for jurisdiction evidencing to the defendant by legal notice the court's assumption of jurisdiction, not met by cases cited:)

4 *So. Mich. Nat. Bank v. Byles,* 67 Mich. 296 at 306;
Ledyard's Appeal, 51 Mich. 623.

Pages cited:

II.

REBUTTAL TO BRIEF FOR FRIEND OF THE COURT

4–5 —noting that the prosecutor has ignored entirely the brief on behalf of appellant, and has introduced only three points:

1. that reference may be stipulated;
2. that the practice has been generally approved;
3. that mere quasi-judicial duties may be referred.

6 —that the cited authorities on stipulated reference are inapplicable.

7 —that cited authorities on general approval of the Friend of the Court's practice are not conclusive, nor representative;

10 *Statement by President of the Mich. State Bar,* Detroit News, May 19, 1944, before Genesee Co. Bar Ass'n (warning of "socialization of legal profession next");

How Nazi German Has Mobilized and Controlled Labor, Brookings Institution, (1940), Pamphlet No. 24, p. 17;

Am. Bar Jour. August, 1940, p. 681 (relative to examination of statistics, offered by Friend of the Court with inadequate analysis and omitting basis for analysis);

Manual of Court Function and Procedure for Social Workers (1944), p. 14 (emphatically disowning any contamination of relationship with Friend of the Court).

15 —examination of the cited authorities and arguments relative to the distinction between quasi-judicial and judicial functions as a necessary step in the slow progress of civilized law

Pages cited

procedure out of the dark confusion imposed by tyrannical antiquity;

17 *History of England,* by Lord Macauley, Vol. 1, Chapt. 1, p. 19 of 97 pages in c. l. ("government may exist in a high degree of excellence long before the limits of legislative, executive, and judicial power have been traced with precision."

20 *Ekern v. McGovern,* 46 LRAns, 796 at 830 ("unfortunate that the various terms, judicial, quasi-judicial, administrative, and administrative judicially exercised, have been used in some decisions while speaking about one and the same thing.")

OUTLINE OF INFORMAL STATEMENT AND BRIEF OF FRIEND OF THE COURT ON MOTION FOR REHEARING

1-2 —a "large part of the work of the Friend of the Court is investigating and obtaining facts and submitting reports and recommendations to the court, and in this cause the attorney for the appellant had received notice of the hearing of the matter involved."

2 —that a rule of limitations may be applied in litigation before probate courts, as *In re Dowling's Estate,* 308 Mich. 129, does not mean such rules apply in other courts,

Mich. C. L. '29, Sec. 12739 [discussed in appellant's brief, p. 38].

—the rule set forth in *Bush v. Meacham,* 53 Mich. 574, that the litigant may not judge the fact of whether process is served imposing the court's jurisdiction over her antagonist, does not apply to service of a paper represented

Pages cited

as a mere pleading filed more than a decade after entry of the final decree in a cause.

—the rule recognized in *Risser v. Hoyt,* 53 Mich. 185, that statutes derogatory of the common law must be strictly construed, does not mean, because applied to the statute involving in that case attachments, that it should be applied to prosecution in the public interest under Mich. Pub. Act 412 of 1919 as amended.

3 —"Nothing in the record shows" presentment of matter going to the merits on behalf of Joseph Metzinger respecting the only question which the Friend of the Court will consider (whether custody by Louise Metzinger be "absolutely intolerable"—noticed in brief for Joseph Metzinger at p. 216).

4—appellant's protest that he has been denied due process of law in various particulars "is without merit."

—the Friend of the Court is properly authorized by the practice of the court to maintain prosecution in the public interest against the defendant in such manner as denies him either permission or opportunity to know what is presented to the court against him.

5–8 —sworn affidavit disclosing nation-wide conditions identical in general with the representations offered on behalf of appellant as reasons for considering review [being the apparent basis of a silent rebellion among the populace, substituting mere concubinage for registered marriages, desperately avoiding child birth, reducing national birth rates within a quarter century by approximately 50% in

Pages cited

the most amazing co-ordination with reformed court procedure substituting social workers for lawyers and organized political charity investigations for judicial process; wholly irrespective of awakening racial consciousness involving Australasia as the focal center of World War III, preparing to arise in eastern Asia admidst a population approaching one billion, for which our falling birth rates represent an invitation to conquest].